he must be travelling fast. He also stated that he did not apply his brakes when he saw the car turning back to its side of the road, but merely reduced the speed by not accelerating. He admitted that if he had applied the brakes when he was about 10 yards from the car he might have avoided the collision. Perhaps in view of the heavy load of the lorry and other factors this would appear to be doubtful. He also admitted he did not sound his horn.

Next witness Ben Tan D.W.2, an insurance loss adjuster said that he investigated this incident and took some photographs of the scene — D.8 and D.9, and also D.13A — K. This witness purported to produce a statement taken by another investigator Mr. L. P. George and this statement was supposed to be a statement made by a witness P.W.3.

Mr. Mooney for the appellant put up to me again the defence version of the story which was urged before the trial president, namely, that the car went to the other side of the road to see the dredge and when it saw the lorry coming, returned to its own side. But in the meantime the lorry having seen the car move to his side of the road swerved to the right with the result that they collided about the center of the road.

Mr. Mooney also attacked the evidence of the three girls. He argued that these girls were not really suffering from amnesia but deliberately refused to tell the trial court the true version of the incident because the true version would be in favour of the appellant. He also said that there was no medical evidence to support the allegation of amnesia.

On this question of alleged amnesia, it is true that the two older girls said they could not remember what happened and from that statement the learned president himself thought that they must have suffered from amnesia. He, however, believed that. I do not see any reason why I should disagree with him. The girls were very young and the horrible incident which nearly killed them could easily have caused amnesia.

Mr. Mooney also attacked the evidence of the three Indian witnesses who were at the scene. All these points brought by him were argued at the trial and considered by the trial president. I agree there are discrepancies and some contradictions. The learned president however, expressed the view that these witnesses were witnesses of truth notwithstanding the discrepancies and contradictions. He came to the conclusion that the lorry went to the side of the car, pushed it to the side of the road and then fell over it.

With reference to the defence story, the learned president was of the view that it could not reasonably be true. He also held the view that even if the driver's story was true, he did not think that the driver was justified in going to his wrong side of the road in an attempt to avoid collision.

The learned president held that the appellant was driving much faster than 31 miles per hour and that he must have lost control of his vehicle when taking the bend at such a great speed. He also found that the driver of the car must have tried to avoid the lorry by swerving further to his left side to the grass verge and that the collision took place there.

In my view this appeal revolves substantially on questions of fact and credibility of witnesses. In my view I see no reason why I should interfere with the finding of facts made by the learned president. I would therefore dismiss the appeal against conviction.

With reference to the appeal against sentence, it is true that in principle a court should not impose a fine which it knew or ought to have known that the accused was not in a financial position to pay. In this case, however, in my view the alternative to this fine would be a sentence of a term of years of imprisonment. After all four lives have been lost as a result of this offence. I would therefore set aside the sentence of fine and order that the appellant be sentenced to a year's imprisonment with effect from the day he was brought to the court.

Appeal dismissed.

Solicitors; *Skrine & Co.*

PEOPLE'S INSURANCE CO. OF MALAYA LTD. v. HO AH KUM & ANOR.

[F.C. (Wee Chong Jin C.J., Tan Ah Tah F.J. & Buttrose J.) May 31, 1967]

[Singapore — Federal Court Civil Appeal No. Y. 19 of 1967]

Insurance — Third-party risks and compensation — Whether driving on order or with permission of insured — Pleadings — Motor Vehicles (3rd Party Risks and Compensation) Ordinance, 1960, s. 8.

Practice and Procedure — Pleadings — Defence — Appeal on matter not raised at trial — Not allowed.

This was an appeal from the judgment of Kulasekaram J. in an action brought by the respondents to recover the sum of $31,500 and costs from the appellants under section 8 of the Motor Vehicles (Third Party Risks and Compensation) Ordinance 1960 obtained against one Foo. The claim against Foo was made by the respondents as administratrices of the estate of one Wan deceased who was killed as a result of the negligent driving of the said Foo. They alleged that at the time of the accident Foo was driving the motor van on the order or alternatively with the permission of one Yeo to whom a policy of insurance had been issued by the appellants under which policy the appellants agreed to insure Yeo and any other person driving on Yeo's order or with his permision in respect of any liability at law. The appellants in their defence denied that Foo, at the time

of the accident, was driving the said van on the order of Yeo because they alleged that Yeo had sold the van and had parted with possession of it to Foo before the date of the accident. They did not deny that Foo was at the material time driving with the permission of Yeo. The learned trial judge *inter alia* found that when Yeo gave Foo permission to use the van he did not place any restriction on Foo as to how he was to use it, and accordingly gave judgment against the appellants. The appellants did not dispute any of the findings of fact by the trial judge but before the Federal Court they argued their appeal on two grounds: (1) they submitted that the judgment could not stand as the trial judge had failed to make a necessary finding of fact whether or not Foo, at the time of the accident, was driving the van on the order of Yeo; (2) that the trial judge not having found that the user of the van by Foo was within the terms of the contract of insurance entered into by the appellants with Yeo, the respondents had failed to prove that the van was being used in accordance with the limitation as to use thereof within the terms of the policy.

Held: (1) the appellants having chosen to defend the action in the manner they did, ought not to be allowed at the appellate stage to complain of the failure of the trial judge to make a specific finding;

(2) under the policy of insurance, a use otherwise than in accordance with the limitations as to use clause endorsed on the policy, was an exception to the liability against which the appellants undertook to indemnify the insured and accordingly should have been expressly pleaded. Not only must it be expressly pleaded, the burden of proof was on the appellants, as insurers, to prove the necessary facts to establish the exception. The appellants in this case have failed to adduce any evidence to discharge the burden cast upon them.

Case referred to:—

(1) *Ratnam & Anor.* v. *The Public Insurance Co. Ltd.* [1956] M.L.J. 152.

FEDERAL COURT.

Tan Tee Seng (*Patrick Ong* with him) for the appellants.

Dennis Murphy for the respondents.

Cur. Adv. Vult.

Wee Chong Jin C.J.: This is an appeal from a judgment of Kulasekaram J. in the High Court of Singapore in an action brought by the respondents to recover from the appellants under the provisions of section 8 of the Motor Vehicles (Third-Party Risks and Compensation) Ordinance 1960 the sum of $31,500 and costs being the amount of a judgment and costs obtained by the respondents against Foo Tai Pou in Civil Suit No. 1653 of 1961 in the High Court of Singapore.

The claim against Foo Tai Pou was made by the respondents as the administratrices of the estate of Wan Lye Sum deceased for damages for the dependents and for the estate of the said deceased as the result of the negligent driving of the said Foo Tai Pou of motor van SG. 5063 on the 25th day of June 1961 which resulted in the death of the deceased.

In the present action the respondents, in paragraph 3 of their statement of claim, pleaded that at the time of the accident the said Foo Tai Pou (hereinafter referred to as "Foo") was driving the motor van on the order or alternatively with the permission of one Yeo Soo Moh (hereinafter referred to as "Yeo") to whom a policy of insurance had been issued by the appellants under which policy the appellants agreed to insure Yeo and any other person driving on Yeo's order or with his permission in respect of any liability at law for compensation costs and expenses which might be incurred by Yeo or any other person driving on Yeo's order or with his permission in respect of death or bodily injury to any person caused by or arising out of the use of motor van SG. 5063.

The appellants in their defence denied that Foo, at the time of the accident, was driving the said motor van on the order of Yeo, because they allege that Yeo had sold the said motor van and had parted with possession of it to Foo before the date of the accident. They did not deny that Foo was at the material time driving with the permission of Yeo and accordingly from the pleadings the appellants did not join issue with the respondents on the latter's averment that Foo was at the time of the accident driving the motor van with the permission of Yeo.

Nor did the appellants in their defence plead that at the time of the accident the motor van was being used for a purpose other than a use in connection with Yeo's business so that, there being a condition in the policy of insurance expressly excluding liability in respect of any accident loss damage or liability caused sustained or incurred whilst the vehicle was being used otherwise than in accordance with the limitations as to use as specified in the policy of insurance, the damages and costs were not a liability covered by the terms of their policy of insurance.

On the pleadings therefore no issue arose as to whether or not at the time of the accident the motor van was being used in connection with Yeo's business.

It was not surprising therefore that at the trial the evidence called on behalf of both parties related almost entirely to the sole question whether or not Yeo had sold and parted with the possession of the motor van SG. 5063 to Foo before the date of the accident.

For present purposes the material facts found by the trial judge disclosed that in October 1960 Foo was employed by Yeo to sell flour on a commission basis. For the purposes of this employment, Foo used a bicycle owned by Yeo who was at that time also the owner of motor van SG. 5063.

A few days later, Yeo told Foo he wanted to sell this motor van and Foo after some discussion with Yeo, agreed to buy it as it would be more convenient for him to go about his work in a motor van rather than on a bicycle. The price was agreed at $1,600, of which Foo was to pay a first instalment of $800, and the balance

of $800 by monthly instalments of $200.

An agreement was drawn up and executed by the parties on the 29th November 1960 at which time Foo paid Yeo $800. The terms of this agreement are not material for the purposes of this appeal. After the execution of this agreement the certificate of insurance, but not the policy of insurance, was handed over to Foo by Yeo, who told Foo that unless payment of the agreed price was made in full, the motor van would not be transferred to Foo's name. After the execution of this agreement Yeo also gave delivery of the motor van to Foo but it was never the intention of both of them that the property in the motor van should pass as a result of the agreement and the delivery of the certificate of insurance and the motor van to Foo. The trial judge also found that when Yeo gave Foo permission to use the van from 29th November 1960, he did not place any restrictions on Foo as to how he was to use this motor van.

Significantly, although the trial judge made no specific finding as to the use to which the motor van was put at the time of the accident the trial judge in his judgment had this to say on this particular point, namely:—

> "At the time of the accident Foo maintained that he was returning after delivering Yeo's flour. Yeo himself in his evidence did not deny this fact, probably as this fact was not one in issue on the pleadings. That being so I wish to say no more on this point."

The trial judge accordingly gave judgment against the appellants who now appeal. The appellants do not dispute any of the findings of fact of the trial judge but before us argued their appeal on two main grounds.

They submit first, that the judgment could not stand as the trial judge had failed to make a necessary finding of fact whether or not Foo, at the time of the accident, was driving the motor van on the order of Yeo. It is contended that, on the facts that are not now in dispute, the only conclusion in law is that Foo was not at the material time driving the motor van with the permission of the insured and the appellants rely on the case of *Ratnam & Anor.* v. *The Public Insurance Co. Ltd.*[1] a decision of the High Court of Singapore which was affirmed by the then Singapore Court of Appeal (see [1957] M.L.J. 158). Accordingly, it was necessary for the trial judge to find as a fact whether or not at the material time Foo was driving the motor van on the order of Yeo.

In my opinion it is unnecessary to deal with *Ratnam's* case, which was a case on permission. On the pleadings, it is clear that the appellants had chosen to contest the issue of whether or not Foo was at the time of the accident driving the motor van on the order of the insured solely on the question of fact whether or not the insured had prior to the date of the accident sold and parted with possession of the motor van. On this question of fact, which the trial judge considered at length in his reserved judgment, the trial judge found against the appellants and having so found it was perhaps not surprising that he did not then go on to make a specific finding that Foo, at the time of the accident, was driving the motor van on the order of the insured.

In my opinion the appellants having chosen to defend the action in the manner I have already set out, ought not to be allowed at this stage of the proceedings to complain of the failure of the trial judge to make a specific finding as to whether Foo, at the time of the accident was driving on the order of the insured.

In any event, having regard to the relationship between Foo and Yeo throughout all material times; to the purpose for which Foo agreed to purchase from Yeo the motor van; and most important of all to the uncontradicted evidence of Foo that when the accident occurred he was returning after delivering Yeo's flour and there being no evidence to the contrary, I take the view that there is sufficient evidence on the record for me to find and I do find that at the time of the accident Foo was driving the van on the order of the insured.

The appellants' second main ground of appeal is "that the trial judge not having found that the user of the motor van by the driver Foo was within the terms of the contract of insurance entered into by the appellants with Yeo, the respondents had failed to prove that the said van was being used in accordance with the limitation as to use thereof within the terms of the policy".

This ground can be shortly disposed of. In the first place, as I have earlier indicated, they did not set this up as a defence to the claim. Under the policy of insurance, a use otherwise than in accordance with the limitations as to use clause endorsed on the policy, is an exception to the liability against which the appellants undertook to indemnity the insured and accordingly should have been expressly pleaded. Not only must it be expressly pleaded, the burden of proof is on the appellants, as insurers, to prove the necessary facts to establish the exception. Furthermore, not only have the appellants failed to adduce any evidence, other than the evidence of the sale and delivery of the motor van by Yeo to Foo before the date of the accident, to discharge this burden, but we have on the part of the respondents the uncontradicted evidence of Foo that at the time of the accident he was returning after delivering Yeo's flour.

For these reasons I would dismiss the appeal with costs.

Tan Ah Tah F.J. and **Buttrose J.** concurred.

Appeal dismissed.

Solicitors: *Abishegan-Naden & Co.; Murphy & Dunbar.*